No. 18,671

IN THE

United States Court of Appeals

For the Ninth Circuit

MANILA TRADING & SUPPLY COMPANY (GUAM), INC.,
Appellant,

vs.

A. G. MADDOX,
Appellee.

BRIEF FOR APPELLEE

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Subject Index

Table of Authorities Cited

Codes

Constitutions

Rules

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BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

This action was commenced by appellant in the District Court of Guam seeking a refund of gross receipts taxes. (R., doc. 1) Appellee counterclaimed for additional gross receipts taxes pursuant to Rule 13(a), Federal Rules of Civil Procedure. (R., doc. 5, p. 4.)

Jurisdiction of this action is vested in the District Court of Guam by Section 19508.01, et seq., Government Code of Guam, and by the Organic Act of Guam, 64 Stat. 307 (1950), 48 U.S.C., Section 1424(a) (1958).

Appeal to this court is authorized by 28 U.S.C., Section 1291 (1958), and 28 U.S.C., Section 1294(4) (1958 Supp. IV).

STATEMENT OF THE CASE

In 1959 and 1961, Manila Trading and Supply Company (Guam), Inc., appellant herein, negotiated and sold, in Guam, automobile and truck parts to Manila Trading and Supply Company (Philippines), Inc., its parent corporation. (R., doc. 12, p. 2.) The above sales amounted to $38,334.79, and a gross receipts tax of $766.69 thereon was voluntarily paid by appellant to the Commissioner of Revenue and Taxation, Government of Guam, appellee herein. (R., doc. 13, p. 1.)

This action was commenced in the lower court by appellant seeking to recover the above tax in count one of its complaint. (R., doc. 1, pp. 1-2.) The complaint alleged that the above tax is illegal in that the taxes were not uniformly applicable in violation of the legislative powers conferred by the Organic Act of Guam, that the taxes were measured by the application of rates against gross proceeds of sales in foreign commerce, and that the taxes were subjects of nonlocal application. (R., doc. 1, p. 2.)

In 1959, 1960 and 1961, appellant, as agent of United States sellers, received commissions from sales of cars to Guam buyers for delivery in the United States mainland. (R., doc. 13.) These commissions were not reported by appellant in its gross receipts tax returns for the above years, and appellee counter-

claimed for the taxes due thereon. (R., doc. 5, p. 4.) By stipulation, the parties agreed as to the amount of commissions not so reported and as to the amount of tax due the government if the tax is upheld. R., doc. 12, p. 3.)

The parties to this suit stipulated, among other things, that appellant is a domestic corporation; that it annually filed application to do business as a wholesale, retail and service organization; that the sales between it and its parent corporation were negotiated for and completed in Guam; and that title to the merchandise passed on Guam, but delivery was to be made to the Philippines with the purchaser bearing all expenses for freight, handling, shipping and delivery charges. (R., doc. 12.)

The case was submitted for decision to the lower court on the basis of the stipulation entered on March 1, 1963. (R., doc. 13, p. 1.)

On January 21, 1963, appellant gave notice that it will move the court to dismiss the counterclaim on the grounds that the court lacked jurisdiction and the counterclaims do not state claims upon which relief can be granted. (R., doc. 7.) The record does not indicate how this motion was treated, if at all, but appellant states in its brief that the motion was heard on February 1, 1963. (Appellant's Brief, p. 4.)

The court rendered a judgment in favor of appellee on his counterclaim of $182.72 and against appellant on its claim for refund of $766.69.

From this judgment, the appellant appeals.

SUMMARY OF ARGUMENT

I

The lower court had jurisdiction to enter judgment on the counterclaims and the counterclaim did state claims upon which relief could be granted.

A. Jurisdiction of the complaint confers jurisdiction over compulsory counterclaims. No one questions that the lower court had jurisdiction of the complaint.

The counterclaims dealt with the same tax and involved the same tax years as the complaint. Such logical relationship establishes that the counterclaims were compulsory under Rule 13(a), Federal Rules of Civil Procedure.

The court's jurisdiction of the complaint, therefore, supports its jurisdiction over the counterclaims.

B. The counterclaims did state claims upon which relief could be granted.

Section 19503, et seq., Government Code of Guam, was, by implication, interpreted by the lower court as not embracing counterclaims by the Tax Commissioner in suits for refund of taxes. Such interpretation is binding on this court unless manifest error is shown. Appellant failed to show manifest error.

Since appellant's contention that the counterclaims did not state claims upon which relief could be granted is supported solely by Section 19503, et seq., its non-applicability disposes of its objection.

II

The Commerce Clause does not bar the tax measured by commission received by appellant from state-side sellers.

The Commerce Clause does not preclude a tax on local activities measured by commissions received on interstate sales. The services performed by appellant in earning the commissions being performed wholly in Guam constitute intrastate activities beyond the protection of the Commerce Clause.

Even if appellant's performance of service is considered interstate commerce, including the receipts thereof in measuring a tax for the privilege of doing a local business is not precluded by the Commerce Clause because the tax is nondiscriminatory and cannot be repeated by any other state.

III

Neither the Commerce Clause nor the Import-Export Clause bar a tax measured by receipts of a local sale though the goods sold were intended for shipment to the Philippine Islands.

Any tax is prohibited by the Import-Export Clause on goods having the status of "export". The automobile and truck parts sold to appellant's parent corporation were not shown to have been "exports" at the time of sale. Therefore, the receipts from such sale may be included in the measure of a tax on the privilege of doing a local business.

IV

The Gross Receipts Tax is uniformly applicable and is a subject of local application as required by the Organic Act of Guam.

The tax is uniformly applicable because it treats members within a class in the same manner. The classification distinguishing wholesalers from manufacturers or producers is a reasonable one, and appellant has not shown otherwise nor any harmful effect on it.

The tax is a subject of local application because it deals with persons and activities essentially local in nature.

ARGUMENT

I

THE COURT BELOW DID NOT ERR IN ENTERING JUDGMENT FOR APPELLEE ON HIS COUNTERCLAIMS BECAUSE THE COURT HAD JURISDICTION AND THE COUNTERCLAIMS DID STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED.

A. Jurisdiction over the subject matter of the complaint is sufficient to support jurisdiction over a compulsory counterclaim.

Appellant's jurisdictional statement in its brief shows that the lower court had jurisdiction of the complaint. Appellant's Brief, p. 1.)

That the counterclaims are compulsory under Rule 13(a), Federal Rules of Civil Procedure, made applicable to Guam by the Organic Act of Guam, 64 Stat. 389 (1950), 48 U.S.C., Section 1424(b) (1948),

is supported by a comparison of the claims alleged in the complaint (R., doc. 1) and those alleged in the counterclaims. (R., doc. 5, p. 4.)

Appellant alleged that gross receipts taxes were illegally assessed and collected on various dates in 1959, 1960 and 1961, and prayed for a refund of all such taxes. (R., doc. 1, pp. 1-11.)

Appellee alleged that appellant underreported its receipts for gross receipts tax purposes in 1959, 1960 and 1961, and prayed for the tax due thereon. (R., doc. 5, p. 4.)

The claims by both parties involved the same taxes as well as the same years. A more logical connection could not be imagined, and it should be held that the counterclaims were compulsory under Rule 13(a). *Rosenthal v. Fowler,* 12 F.R.D. 388 (S.D. N.Y. 1952.)

Section 19503, et seq., Government Code of Guam, does not apply as it does not concern the lower court's jurisdiction.

B. The counterclaims do state claims upon which relief could be granted.

Appellant contends that the counterclaims do not state claims upon which relief could be granted. In support of this contention, appellant asserts that the Tax Commissioner failed to comply with the notice and waiting period requirement of Section 19503, et seq., Government Code of Guam. (Appellant's Brief, pp. 1-2.)

Appellant assumes without argument that Section 19503, et seq., Government Code of Guam, is appli-

cable to an action in which the Tax Commissioner is being sued for a refund such as in the case herein.

The statute, however, is not explicit on the subject. That being the case and the statute being local, it is subject to interpretation by the lower court, and if the interpretation is not manifestly in error, it will be affirmed in this court. *Gumataotao v. Government of Guam,* Appeal No. 18,448 (9th Cir., Sept. 16, 1963.)

Appellant stated that it moved to dismiss the counterclaims and the motion was heard by the court. (Appellant's Brief, p. 1.) Record Document 7, pointed out by appellant, is, among other things, a notice that appellant will move the court to dismiss the counterclaims for lack of jurisdiction and for failing to state claims upon which relief may be granted.

The record does not indicate that the motion was heard. Assuming, however, that it was heard, appellant must have argued to the lower court the applicability of Section 19503, et seq., Government Code of Guam, to the counterclaims. If this is true, then implicit in the judgment of the court on the counterclaim is the ruling that Section 19503, et seq., is not applicable to counterclaims.

Is such a ruling manifestly in error?

The lower court could reasonably have ruled that a counterclaim which is compulsory under Section 13(a), Federal Rules of Civil Procedure, filed in a refund suit is not a legal action contemplated by Section 19503, et seq., Government Code of Guam.

The difference between an original action against a taxpayer and a counterclaim against him is sub-

stantial enough to support the distinction above made. An original action involuntarily brings a taxpayer to court. In a counterclaim, the taxpayer is voluntarily in court. In the former case, a taxpayer has no opportunity to decide whether he will contest or pay the tax. In the latter, no such opportunity is needed because the taxpayer has already decided to contest the tax at least on the aspects involved in his claim.

An original action by the government may be deferred until notice is given without any significant detriment to it. A compulsory counterclaim cannot be so deferred, as it may bar the government's claim.

The court could also have reasonably ruled that a counterclaim for a deficiency in a refund suit is not an action seeking the collection of a deficiency but rather is an action to establish the existence of such a deficiency. Thus, a final judgment in such action may be but a basis for an assessment against the taxpayer which would be subject to the notice provision prior to its execution.

The above reasons support the conclusion that appellant has not shown manifest error in the lower court's implied holding that Section 19503, et seq., does not apply to a counterclaim, and the judgment should be affirmed.

II

A NONDISCRIMINATORY TAX MEASURED BY COMMISSIONS RECEIVED FOR SERVICES RENDERED IN GUAM DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 3, BECAUSE IT IS A TAX FOR THE PRIVILEGE OF ENGAGING IN A LOCAL BUSINESS AND FOR THE PRIVILEGE OF EXERCISING CORPORATE POWERS.

A. The tax imposed by Sections 19540 and 19541.03, Government Code of Guam, is a tax on the privilege of exercising corporate powers in Guam and on the privilege of engaging in a local service business, and its measure includes commissions.

The statement of the case indicates that there are two types of transactions involved in this case. One type consists of sales of automobile and truck parts by appellant. The other consists of commissions received by appellant from mainland sellers for services rendered by appellant in procuring Guam buyers. The latter transaction is the subject of this argument.

The purpose of this subsection is to identify the provisions of the Business Tax Law, Title XX, Chapter 6, Government Code of Guam, under which the contested tax was levied and to indicate the subject matter and the measure of the tax.

The applicable provisions are as follows:

> "Section 19540. Levy. There is hereby levied and shall be assessed and collected monthly privilege taxes against the persons on account of their businesses and other activities in Guam measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be."

"Section 19541.03. Tax on Service Business. Upon every person engaging or continuing within Guam, in any service business or calling not otherwise specifically taxed under this Section, a tax equivalent to two per cent (2%) of the gross income of such business."

"Section 19500.01. 'Business' and 'Engaging in Business' includes all activities whether personal, professional or corporate, carried on within Guam for economic benefit either direct or indirect but shall not include casual sales; engaging in business shall also include the exercise of corporate franchise powers."

"Section 19500.05. 'Gross Income' . . . shall mean the total receipts, cash or accrued, of the taxpayer received as . . . commissions . . ."

These provisions clearly indicate that the subject of the tax is both the privilege of exercising corporate powers in Guam and the privilege of engaging in a service business in Guam. The measure of the tax is two per cent (2%) of the gross income which includes commissions.

Appellant being a domestic corporation and being licensed to engage in a service business is subject to the tax unless the tax is proven unconstitutional. This much appellant apparently concedes inasmuch as no issue was raised concerning the scope of the statute.

B. A tax on the privilege of exercising corporate powers in Guam and on the privilege of engaging in Guam in a service business is a tax on intrastate commerce and, therefore, not barred by the Commerce Clause, though the measure of the tax may include commissions on interstate sales.

Appellant is a Guam corporation. It negotiated on behalf of mainland United States sellers sales of automobiles to buyers who were in Guam. The services rendered by appellant were rendered in Guam.

It necessarily follows that such activities being local in nature, Guam can exact a tax for the privilege of engaging in them. *Memphis Natural Gas Co. v. Stone,* 335 U.S. 80, 68 S. Ct. 1475 (1948.)

The sale of automobiles by a United States seller to a Guam buyer is concededly interstate commerce. The services rendered by appellant were concededly in aid of such interstate commerce, but this does not change the local nature of such services. *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S. Ct. 546 (1938.)

That the measure of the tax includes commissions resulting from interstate sales is not controlling. *Ficklen v. Taxing District of Shelby County,* 145 U.S. 1, 12 S. Ct. 810 (1892), and *In re Taxes,* 379 P. 2d 336 (S. Ct. Ha., 1963.)

In the *Ficklen* case, *supra,* Tennessee imposed a license on the privilege of engaging in the general business of a broker measured by the gross receipts of the business. A license holder opposed the exaction on the ground that his business consisted almost entirely of commissions, derived from sales by firms

outside Tennessee to buyers in Tennessee, and, therefore, the Commerce Clause barred the exaction. The Supreme Court upheld the tax on the rationale that the privilege being taxed is of a local nature and not affected by its measure.

The facts of this case fall closely to those in the *Ficklen* case. Appellant is licensed to engage in a general service business. The tax is on the privilege of engaging in such business. Here, as in the *Ficklen* case, the measure of the tax includes commissions derived from interstate sales. The *Ficklen* case should, therefore, control and dispose of this case.

In re Taxes, supra, is again analogous to this case. In that case, the Supreme Court of Hawaii upheld a tax measured by commissions received from United States manufacturers by a manufacturer's representative for services rendered in Hawaii in procuring buyers. The rationale of the Hawaii case is that the services were rendered in Hawaii, and thus local in nature.

The rationale of these two cases should be followed in this case and the tax upheld.

In re Taxes, supra, also stressed the fact that the tax is nondiscriminatory. Section 19541.03, Government Code of Guam, imposes the tax without any distinction and is thus nondiscriminatory.

C. Should it be ruled that appellant in performing the services herein involved was engaged in interstate commerce, the tax is nevertheless valid because Guam has a "jurisdiction to tax" in a due process sense, the tax is nondiscriminatory, and it cannot be repeated by any other state.

Appellant asserts that the Business Privilege Tax Law of Guam is an express burden on interstate commerce, and is, therefore, invalid. (Appellant's Brief, p. 8.) In support of this argument, appellant states that Section 19541.0101, Government Code of Guam, purports to impose a tax burden on interstate commerce.

As noted at the beginning of this argument, the transaction involved herein is the commissions received by appellant for services rendered. Thus, Section 19541.0101 has no application because that concerns the measure of the tax imposed for the privilege of selling tangible property. The tax herein questioned is measured by Section 19541.03 as pointed above.

Appellant's basic premise seems to be that a tax which expressly burdens interstate commerce is per se barred by the Commerce Clause. *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422, 67 S. Ct. 815 (1947), is cited as supporting this proposition.

Appellant is peculiarly silent on the facts of the *Joseph* case. The facts of that case show that it involved a tax imposed on a stevedoring business. The court invalidated the tax because stevedoring was held to be an integral part of interstate commerce, and an exaction from such business is an exaction for the privilege of doing interstate commerce.

Thus, it is clear that the *Joseph* case was influenced by the fact that it concerned a stevedoring business. The Supreme Court recognized this and refused to extend its principle to other activities even more closely related to that case than to this one. *Alaska v. Arctic Maid,* 366 U.S. 199, 81 S. Ct. 929 (1961.)

A tax which affects interstate commerce "directly" is not per se barred by the Commerce Clause. *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 69 S. Ct. 1264 (1949); *International Harvester Co. v. Department of Treasury,* 322 U.S. 340, 64 S. Ct. 1019 (1944), recently cited with approval in a per curiam opinion, *State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.,* 372 U.S. 605, 83 S. Ct. 925 (1963); and *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 60 S. Ct. 388 (1940.)

Interstate Oil Pipe Line Co. case, *supra,* involved a gross receipts tax on the privilege of operating a pipe line wholly within the state of Mississippi. The measure of the tax included the total receipts received from such business unapportioned. The pipe line involved was owned by a Delaware corporation qualified to do business in Mississippi. The pipe line transported oil from the producers well to racks adjacent to railroads, and from which the oil was poured into tank cars for delivery to points outside Mississippi. The pipe line company charged the producers a fee for the delivery of the oil to the racks.

In upholding the tax, the court assumed without deciding that the pipe line company was engaged in

interstate commerce. The rationale of the case is that sufficient contact with Mississippi is present to give that state jurisdiction to tax; the tax is nondiscriminatory; since the activity is purely local, no apportionment is necessary; and the tax cannot be repeated by any other state.

The present tax meets these standards. Appellant is a domestic corporation engaged in a general service business. Sufficient contacts are present to permit Guam to tax in the due process sense. Section 19541.03 taxes every person engaged in a service business. No distinction is drawn, therefore, the tax is nondiscriminatory. The tax need not be apportioned because the services by appellant were rendered in Guam. This distinguishes cases such as *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434, 59 S. Ct. 325 (1939), where services were rendered outside the state. Finally, the incident of the tax being local, no other state can repeat the tax.

For the reasons above mentioned, the tax herein questioned should be upheld.

III.

A NONDISCRIMINATORY TAX MEASURED BY SALES NEGOTIATED AND COMPLETED IN GUAM DOES NOT VIOLATE THE COMMERCE CLAUSE, ARTICLE I, SECTION 8, CLAUSE 3, OR THE IMPORT-EXPORT CLAUSE, ARTICLE I, SECTION 10, CLAUSE 2, OF THE FEDERAL CONSTITUTION BECAUSE IT IS A TAX FOR THE PRIVILEGE OF ENGAGING IN A LOCAL BUSINESS AND FOR THE PRIVILEGE OF EXERCISING CORPORATE POWERS IN GUAM, AND IS NOT A TAX ON EXPORTS.

A. The tax imposed by Sections 19540 and 19541.01, et seq., Government Code of Guam, is a tax on the privilege of selling tangible goods in Guam and for the privilege of exercising corporate powers measured by two per cent (2%) of gross sales.

Section 19540 levies a tax on every person on account of his business and other activities in Guam. Section 19500.01 includes in the definition of business the exercise of corporate powers.

A tax of two per cent (2%) of gross proceeds of sales is laid upon every person engaging within Guam in the business of selling any tangible property. Section 19541.01, Government Code of Guam.

Section 19541.0101 provides that gross proceeds of sales of tangible property in foreign commerce shall constitute a part of the measure of the tax imposed.

Section 19501.03 provides that if any person is engaged in business both within and without Guam, and if, under the Constitution or laws of the United States, the entire gross income or scope of such business activity of such person cannot be included in the measure of any tax under this Chapter, there shall then be apportioned to Guam and included in the tax

base that portion of the gross income or business activity which is derived from or attributable to Guam.

It is clear from a mere reading of the above provisions that the Legislature intended to exert to the fullest extent its power to tax. It is also clear that it did not intend to tax any transaction which the Constitution or the laws of the United States prohibits it from taxing. Such being the case, it cannot be contended that the Business Privilege Tax Law is unconstitutional on its face.

The above provisions also show that the subject of the tax is the privilege of selling tangible property in Guam as well as the privilege of exercising corporate powers.

Appellant, it has been shown, exercised its corporate powers in Guam. In addition to being licensed to engage in a service business, it also is licensed to engage in wholesaling as well as retailing.

That it sold tangible property in Guam is clear from the stipulation of facts. (R., doc. 12.) It is therein stipulated that sales of automobile and truck parts were negotiated in Guam and title passed in Guam.

Such sales are, therefore, within the measure of the tax unless barred therefrom by any provision of the Constitution or laws of the United States.

B. Neither the Commerce Clause nor the Import-Export Clause bars the transactions herein from being made a part of the measure of the tax imposed by Sections 19540 and 19541.01, Government Code of Guam.

The transaction, included as a measure of the tax, involved sales by appellant in Guam of automobile and truck parts to its parent corporation in Manila, Republic of the Philippines for delivery to the Philippines.

Concededly, the sale invloves foreign commerce as that term is used in the Commerce Clause since the destination of the goods is the Philippines. Whatever was said as to the validity of the tax on commissions in the preceding argument equally applies to the objection raised herein under the Commerce Clause.

A more appropriate objection is whether the tax is barred by the Import-Export Clause. That provision prohibits a state from laying any impost or duties on imports or exports without the consent of Congress except what is absolutely necessary for executing its inspection laws. United States Constitution, Article I, Section 10, Clause 2. While appellant makes no reference to this Clause, it should be considered since, as pointed out, the statute was not intended to reach any transaction barred by the United States Constitution. The cases passing on the validity of tax measures under the Import-Export Clause are, therefore, relevant.

Appellee concedes that the tax herein levied is equivalent to an impost or duty and if laid on exports is invalid. *Brown v. Maryland,* 25 U.S. (12 Wheat.)

419 (1827). The only issue remaining is whether the goods sold, i.e., automobile and truck parts, were, at the time of sale, "exports" within the meaning of the Import-Export Clause.

The Import-Export Clause prohibits the laying of any tax on exports. *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 67 S. Ct. 156 (1946). The tax exacted is, therefore, not material as long as it is imposed on exports.

When are goods within a state deemed to be "exports"? This question was answered in *Empresa Siderurgica v. County of Merced,* 337 U.S. 154, 69 S. Ct. 995 (1949), in the following language:

> "'* * * goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey.' . . . That test was fashioned to determine the validity under the Commerce Clause of a nondiscriminatory state tax . . .
>
> "Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it . . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will

not be diverted to domestic use. Nothing less will suffice." (Citations omitted) 337 U.S. at 156, 69 S. Ct. at 996-997.

The *Empresa* case, *supra,* involved a cement plant located in Merced County, California, which was sold to a Columbia corporation for export to South America. The plant was partially dismantled and parts of it were on their way to South America. The court nevertheless upheld a tax on the portion that was in Merced County on the tax date. The portion thus remaining consisted of parts dismantled, packed and crated; parts dismantled but not yet packed and crated; and parts not yet dismantled.

In thus upholding the tax, the court considered as irrelevant that there was a purpose and plan to export the plant and that the export actually occurred.

Applying the test thus laid down to the facts in this case, it is evident that the automobile and truck parts were not exports at the time of sale.

Appellant has not shown that the tax incident was simultaneous with the delivery of the goods to an exporting carrier for shipment abroad as was true in *A. G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 43 S. Ct. 485 (1923), and *Richfield Oil Corp. v. State Board of Equalization, supra.*

In both the *Spalding* and the *Richfield* cases, the court was satisfied with the certainty that the goods will be shipped to foreign ports. In the *Empresa* case, however, the court was not satisfied although the facts were clear that the cement plant was intended to be

reassembled in South America and some parts had already proceeded thereto. Furthermore, the fact that the plan to export was fully executed was not sufficient.

If certainty of export is the test, then the facts in the present case fall far short of the certainty required by the *Empresa* case.

Appellant has failed to present facts sufficient to establish the goods herein involved to be "exports." Since the burden of proof is on appellant to show that the transaction is within the immunity of the Import-Export Clause, *People of the State of New York v. Graves,* 300 U.S. 308, 57 S. Ct. 466 (1937), its failure to carry that burden should result in the affirmance of the judgment below.

IV

THE GROSS RECEIPTS TAX IMPOSED BY SECTIONS 19540, 19541.01 AND 19541.03, GOVERNMENT CODE OF GUAM, DOES MEET THE REQUIREMENTS OF THE ORGANIC ACT OF GUAM, 64 STAT. 387 (1950), 48 U.S.C., SECTION 1423a (1948), WHICH REQUIRE THAT TAX MEASURES BE UNIFORMLY APPLICABLE AND THAT THE LEGISLATIVE POWER BE CONFINED TO MATTERS OF LOCAL APPLICATION.

A. The tax is uniformly applicable as required by the Organic Act.

Appellant asserts that the tax is not uniformly applicable because manufacturers and producers are exempted from the tax on their sales to wholesalers. (Appellant's Brief, pp. 5-6.) The only authority relied upon by appellant is *Ambros, Inc. v. A. G. Maddox,* 203 F. Supp. 934 (1962).

The uniformity requirement of the Organic Act should be likened to the uniformity required of state tax laws under the 14th Amendment. *Hess v. Mullaney,* 213 F.2d 635 (1964), cert. den., sub nom., *Hess v. Dewey,* 348 U.S. 836, 75 S. Ct. 50 (1954). If this is so, then the issue to be decided is whether the classification adopted by the Legislature is so hostile and discriminatory that it must be invalidated. *Madden v. Commonwealth of Kentucky,* 309 U.S. 83, 60 S. Ct. 406 (1940). The burden of showing that such is the case rests upon the one seeking to overturn the "legislative arrangement," and such burden is not met unless "every conceivable basis which might support it" is negatived. *Madden v. Commonwealth of Kentucky, supra,* 309 U.S. at 88.

Concededly, the Legislature exempted wholesale sales of manufacturers and producers from the tax levied by Sections 19540 and 19541.01, Government Code of Guam; but that manufacturers and producers are essentially different from wholesalers is evident. This difference is both in their mode of operations and in their manner of selling. The Legislature may have felt that producers and manufacturers should be taxed differently because the benefits it receives from the government differ from other business enterprises. This difference between the classes is sufficient to support the partial exemption given to manufacturers and producers. As the court said in the *Madden* case, *supra,* "In taxation, even more than in any other fields, legislatures possess the greatest freedom in classification." 209 U.S. 83, 88.

In *Brodhead v. Borthwick,* 174 F. 2d 21 (1949), cert. den., 338 U.S. 847, 70 S. Ct. 87 (1949), this court sustained an excise tax imposed by Hawaii against the objection that the classification of "retailers" and "wholesalers" was invalid. The Guam tax law is similar, if not identical, to the Hawaii law. If retailers and wholesalers can be classified separately for tax purposes, the same should hold true as between wholesalers and manufacturers or producers.

Finally, this court should take judicial notice that Guam is not a manufacturing or producing state. Hence, any discrimination which may be imposed on appellant who deals in automotive business is merely theoretical and should not be used to invalidate the statute. *Texaco Puerto Rico, Inc. v. Descartes,* 304 F. 2d 184 (1962), cert. den., 83 S. Ct. 720 (1963); *Hess v. Mullaney,* 213 F. 2d 635 (1954), cert. den., sub. nom.; *Hess v. Dewey,* 348 U.S. 836, 75 S. Ct. 50 (1954).

B. The tax is a subject of local application as required by the Organic Act.

Appellant argues that the tax is of nonlocal application and, therefore, invalid. (Appellant's Brief, p. 10.) *Granville-Smith v. Granville-Smith,* 349 U.S. 1, 75 S. Ct. 553 (1955), is cited as authority.

The *Granville-Smith* case involved a divorce statute which the court held was designed to attract persons from outside the Virgin Islands. It is, therefore, not apposite to the statute involved in this case.

It has been shown, however, that the tax herein questioned is a general tax measure imposed on per-

sons on account of their businesses and activities in Guam. As such, it embraces a subject of local application and is valid.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the lower court be sustained.

Dated, Agana, Guam,
November 22, 1963.

Respectfully submitted,

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RICHARD D. MAGEE,
Deputy Attorney General,
FRED E. BORDALLO,
Assistant Attorney General,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD W. BURNETT,
Attorney General,
Attorney for Appellee.